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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996.	Application 02-03-059 (Filed March 29, 2002)

FINAL ARBITRATOR'S REPORT

Background and Procedural History

This is the Final Arbitrator's Report (FAR) in an arbitration conducted pursuant to 47 U.S.C. § 252(b) upon application by Pacific Bell Telephone Company (PacBell) to resolve issues in an interconnection agreement (ICA) that the parties were unable to resolve through negotiation. Pac-West Telecomm, Inc.'s (Pac-West) previous ICA with PacBell expired on June 29, 2001, and these parties are continuing to operate under that agreement until the new ICA is in place.

For purposes of computing time periods that apply under 47 U.S.C. § 252, the parties agreed that April 30, 2001 was deemed to be the start date for negotiations, with the consequence that the final date for filing an arbitration request was on or about October 8, 2001. However, the parties agreed to extend that date four times, and April 1, 2002, was the final date fixed under this series of agreements. PacBell filed its Application for Arbitration on March 29, 2002,

containing all of the items specified by Rule 3.3 of our Revised Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996 (Rules).[1]

Pac-West filed its Response to the Application on April 23, 2002, with the inclusions required by Rule 3.6. The Response indicated that there were 26 unresolved issues to be arbitrated. Although the parties jointly filed a "Revised Statement of Unresolved Issues" on April 30, that document contained inaccuracies relating to the parties' respective draft versions of the ICA. The parties filed another "Revised Statement of Unresolved Issues" on May 16, following an initial arbitration meeting convened by the Arbitrator, correctly identifying the remaining unresolved issues and the parties' respective positions concerning each, and also identifying the issues resolved after the Application was filed. This Revised Statement indicated that 20 issues remained to be resolved by arbitration. Those issues are resolved by the Arbitrator as reported herein.

The Arbitrator commenced the Arbitration Conference and Hearing (hearing) under Rule 3.9 on May 23, 2002. The hearing concluded on May 31 after five days of formal evidentiary presentations and informal conferences. No issues were resolved during the hearing, and the Arbitrator issued no rulings during the hearing, as Rule 3.12 permits.

The parties filed post-hearing briefs, and the proceeding was submitted on June 24 by agreement between the Arbitrator and the parties. By written agreement of the parties, the date for filing of the Draft Arbitrator's Report (DAR) under Rule 3.18 was extended until October 8, and it was filed on that

[1] Administrative Law Judge Victor D. Ryerson was appointed as Arbitrator under Rule 3.4.

date. The parties also agreed to extend the time for filing of the FAR until November 19.

Both parties timely filed comments on the DAR under Rule 3.19. In addition O1 Communications, Inc. (O1), a nonparty, filed comments pursuant to that rule. The substance of these comments is reflected in the FAR to the extent that the Arbitrator deems appropriate.

Parties

PacBell is an Incumbent Local Exchange Carrier (ILEC) that interconnects with Pac-West, as required by 47 U.S.C. § 251, under the terms of an ICA. The ICA that is the subject of this arbitration is the third governing the interconnection arrangement of these parties since enactment of the Telecommunications Act of 1996.

Pac-West is a Competitive Local Exchange Carrier (CLEC) serving customers in California, including those within portions of PacBell's service area. Pac-West has fewer than 10,000 customers, and estimates that more than 20 percent of the dial-up Internet traffic in California traverses its network.

The two parties have greatly differing network architectures, a fact that plays an important role in their efforts to arrive at an agreement concerning interconnection arrangements. PacBell, as the incumbent, has a traditional hierarchical network architecture and ubiquitous presence throughout its service area, served by distributed switching. By reason of its historical monopoly status as the ILEC, PacBell currently has a vastly greater market share of local and intraLATA long distance services in California than Pac-West or any other CLEC.

Pac-West's network is comprised of its own equipment and facilities, combined with equipment and facilities such as DS-3s, DS-1s, local interconnection trunks (LITs), direct end-office trunks (DEOTs), and access

services acquired from PacBell and other companies. The intraLATA circuits for LITs in PacBell territory are always provided by PacBell because of the absence of alternatives. The interLATA circuits are provided by a number of different carriers, depending on facilities location, price, and other considerations.

Pac-West also owns and operates seven Alcatel 600E class 4 (tandem) switches, two in Oakland, three in Los Angeles, and two in Stockton. These switches are clustered together in order to minimize transport, operations, and other facilities costs, based upon network engineering principles. All Pac-West switched traffic, including local traffic, is routed through at least one of these switches, regardless of the type of service or class of customer. The switches are connected to each other using inter-machine trunks (IMTs) that are paid for by Pac-West. The switches are connected to points of interconnection (POIs) with PacBell in the three LATAs where the switches are located, using facilities leased from PacBell and paid for by Pac-West. The switches are extended to the POIs in the other seven LATAs using facilities leased from interLATA carriers and paid for by Pac-West.

From each POI, Pac-West exchanges traffic with all 20 PacBell tandems and PacBell end-offices in one of two ways for local traffic: either to a PacBell tandem using a tandem LIT, or directly to a PacBell end-office switch using a DEOT. At the present time, Pac-West connects to 396 PacBell end-offices using DEOTs. In addition, to reach its customers Pac-West purchases facilities to wire centers (the locations of the PacBell end-offices). Typically, these are DS3s and are provided by PacBell for those wire centers in the same LATA as the Pac-West switch. A variety of interLATA carriers provide the circuits to the Pac-West POI in the other LATAs, and from the POI to the customer interface over facilities purchased from PacBell. Pac-West customers are connected to these “lit” or “tier

A" wire centers using T-1 circuits purchased from PacBell. Pac-West is connected to over 100 California wire centers in this way.

The resulting Pac-West network has a fundamentally different architecture than the Pacific network. Pac-West's switches are located only in the three locations mentioned above. Using the fiber optic and other transport facilities described above, the Pac-West network reaches out to a POI with PacBell in every LATA. Every call to or from a Pac-West customer must pass through at least one of these three locations, even if it is a call, for example, from one building in Sacramento to the building next door. Pac-West has developed this network architecture based upon efficiency and cost considerations: the cost of transport facilities between major cities is declining, and it is more efficient to operate a few combined switching facilities than several separate ones. For Pac-West this cost relationship has dictated its decision to pay for transport to its switches instead of building more distributed switching centers.

As explained above, Pac-West directly connects to both end offices and tandem switches of PacBell. By reason of its hierarchical architecture, several PacBell end offices connect to (or "subtend") a single tandem switch. Pac-West's use of these interconnections under the terms of the ICA has enabled it to offer a variety of competitive services in California.

Because of their differing network architectures, every call between a Pac-West customer and a PacBell customer must be routed out of its calling area for delivery to the Pac-West switch handling the call, except for calls originating and terminating in the three local calling areas where Pac-West's switches are located. This is true even if a call is delivered to a Pac-West customer at a location next door to the calling PacBell customer. To eliminate this necessary aspect of its network operation, Pac-West claims it would essentially have to

duplicate PacBell's network facilities, an option that is prohibitively expensive in relation to the size of Pac-West's customer base and traffic volume.

Pac-West's California customers include small businesses for which Pac-West provides basic telephone service (dial tone, telephone numbers, custom calling features and local and toll calls), and Internet access to Internet Service Providers (ISPs) chosen by its customers. The nature of Pac-West's customer base and traffic is a factor that figures importantly in the parties' dispute in this arbitration.

The Telecommunications Act of 1996

This arbitration is being conducted under Section 252(b) of the federal Telecommunications Act of 1996 (the Act), 47 U.S.C. § 252(b). That statute was enacted to encourage competition for local services, which had been severely restricted by industry structure and regulation. It does so by essentially requiring that the facilities of ILECs be made available for use by competitors for compensation under specified standards. This naturally creates a tension between the obligations of an ILEC and the rights of a CLEC competing for the same business through the use of the ILEC's facilities.

In resolving the disputed issues in this arbitration, the Arbitrator and this Commission must ensure that the resolution and any conditions we impose meet the requirements of Section 251 of the Act, including any implementing regulations of the Federal Communications Commission (FCC). 47 U.S.C. § 252(c). We must also adhere to pricing standards mandated by Section 252(d) of the Act, and provide a schedule for implementation of the terms and conditions by the parties to the agreement. (*Id.*)

Disputed Issues

The following disputed issues, which are summarized in the parties' Revised Statement of Unresolved Issues, are resolved by the Arbitrator.

Issue No. 3: Should Pac-West be Required to Connect Directly With Third Parties When the Traffic Between them Reaches 24 or More Trunks?

Discussion and Resolution:

This issue concerns the traffic level at which the burden of provisioning should shift from PacBell to Pac-West, where PacBell is the transiting carrier. As Pac-West acknowledges, there is no dispute about the need to interconnect Pac-West's network directly with the network of a third party carrier; the dispute concerns the level of traffic that should trigger the need for the direct connection. A corollary issue is the question of what period of time should be used to evaluate this traffic level, because traffic between CLECs or a CLEC and another LEC may be highly variable.

PacBell argues that its tandem switch network was never meant to serve all trunking for traffic originating and terminating to end-office switches belonging to PacBell, CLECs, and other LECs, and claims that its tandem switch resources would be rapidly depleted, (a condition known as "tandem exhaust") if CLECs established trunk groups only to PacBell tandem switch offices. Tandem switches cost approximately $12 million each, and PacBell argues that it should not bear the cost of adding tandem switch resources alone, when the need for those resources is caused by all carriers using them. PacBell's own standard for establishing direct end-office trunks (DEOTs) from one end office to another, bypassing the tandem switch, is 24 trunks. PacBell proposes to apply this standard in the ICA to resolve this issue.

Pac-West proposes that a threshold traffic volume of 3 T-1s (72 trunks) be used as the trigger for direct interconnection. Pac-West argues that this level was established in the MCImetro ICA, implying that it should receive the same contractual treatment. See *Final Arbitrator's Report in A.01-01-010* (July 16, 2001). The Arbitrator agrees, as this would afford some degree of consistency in developing an appropriate standard.[2]

The Arbitrator agrees with Pac-West that the threshold must be invoked after traffic is evaluated for a reasonable time period. Three consecutive months appears to be adequate for this purpose. The standard of 3 T-1s also appears to be reasonable, and will afford some degree of consistency. To carry out this finding the parties shall adopt language for the disputed provision consistent with these criteria.

Issue No. 4: Should PacBell Continue to Provide Special Access Services to Pac-West If It Detariffs Them?

Discussion and Resolution:

PacBell states that Special Access services are not unbundled network elements (UNEs), and are consequently not among the enumerated items that PacBell is required to provide under 47 U.S.C. § 251. PacBell consequently argues that this is not an issue that is even arbitrable under § 252, and that in any event the Commission will have the opportunity to consider Pac-West's position on the matter if and when PacBell seeks the Commission's authority to detariff its Special Access services.

[2] The Arbitrator notes that Pac-West could opt into the MCImetro ICA.

Pac-West emphasizes that it has historically used PacBell's Special Access services, including T-1s and Synchronous Optical Network (SONET) service, for local interconnection traffic between its network and that of PacBell. Pac-West wants to be able to rely on its ability to continue using these services at present rates for the term of the ICA to avoid "unnecessary network rearrangement or service interruption to its customers."

Pac-West's argument disregards the circumstance that this issue is not arbitrable under 47 U.S.C. § 252, and ignores the fact that it will have an opportunity to be heard on this issue if PacBell seeks authority to detariff Special Access services. Denying Pac-West's request will not disturb the parties' present relationship with respect to these services. The Arbitrator agrees with PacBell insofar the disputed services are Special Access and not UNEs, and the parties shall resolve the issue with respect to Appendix ITR Section 1.5 accordingly.

Issue No. 5: Should Existing POIs Be Changed and, If so, in What Respect and With What Cost Consequences to Each Party? How Should POIs for Future Facilities Be Determined, and With What Cost Consequences to Each Party?

Discussion and Resolution:

Under Section 251 of the Telecommunications Act, POIs may be established at any technically feasible location. Nowhere does the Act mandate that a POI be established at an optimal location, and the location is subject to agreement by the parties. Most of Pac-West's existing POIs were established six years ago in its ICA with PacBell, as reflected in Appendix DCO.

The resolution of this issue will dictate, as a practical matter, whether Pac-West will have to undergo network changes and incur substantial additional facility expenses caused by changing POIs between its network and PacBell's network. Pac-West serves between 5,000 and 10,000 customers in California,

using seven switches in three locations. As previously explained, Pac-West's switches are connected to POIs in the three LATAs where the switches are located, using facilities leased from PacBell and paid for by Pac-West. Pac-West has established a single POI in each LATA, and the Pac-West switches are extended to the POIs in the remaining LATAs by using facilities leased from interexchange carriers at Pac-West's expense.

Pac-West connects to 396 of PacBell's end offices using DEOTs. Each DEOT requires the designation of a POI for the traffic over that facility. In each case, the POI has been designated at the Pac-West end of the facility, i.e., at Pac-West's location or at the point of termination of the interexchange carrier's facility used by Pac-West to provide circuits to wire centers in other LATAs. Pac-West has paid PacBell over the past six years for Special Access circuits that the parties agreed would be used for local interconnection trunks.

Each of Pac-West's switch locations is physically very near a PacBell tandem, and the remaining POIs are located at the terminating points of the interexchange carriers' interLATA facilities. Moreover, all of the POIs are placed close to concentrations of traffic, making the placement of Pac-West's POIs efficient from its standpoint. Appendix DCO, which is a part of the existing ICA, was agreed to as part of the 1999 interconnection agreement between the parties, and PacBell has not proposed any change to that Appendix (which lists the POIs) during the present negotiations or as part of this arbitration. Pac-West estimates that moving all of the existing POIs to the closest PacBell tandem office and adding POIs at the other PacBell tandems would amount to approximately $12 million in increased expenses annually for Pac-West. This would produce no benefit to Pac-West or its customers whatsoever, as compared to the current network's performance; Pac-West asserts that the resulting Pac-West network

interconnection structure would be more costly, and would actually be less efficient than the present one.

The Arbitrator concludes that Pac-West should not be compelled to move the location of its existing POIs for the benefit of PacBell. The latitude granted to CLECs by Section 251 was for leveling the competitive playing field with ILECs whose networks have been in place for decades. PacBell must accept this feature as one of the fundamental underpinnings of the Act. PacBell must also accept the network architecture developed by Pac-West to serve its business needs. To find otherwise would impose a $12 million cost upon Pac-West for constructing new facilities, which in turn would have to be passed on to its customers. Given the size of its customer base, such a requirement would significantly erode its competitive position to PacBell's advantage, defeating the purpose of the Act.

Future POIs should be established in accordance with these existing regulatory principles. The decision to establish new POIs in accordance with Pac-West's customer base and network needs should remain its own, constrained only by those principles and the existence of technically feasible locations. The matter of compensation relating to such decisions is addressed below.

Issue No. 6: If Pac-West Does Not Establish a POI at Every PacBell Tandem Building or Facility Hub, Should Pac-West Compensate PacBell for Transport and Switching of Originating and Terminating Traffic Served by Distant Tandems Within the LATA Where POIs Have not Been Established?

Discussion and Resolution:

Because Pac-West interconnects with PacBell at only a single technically feasible point within each LATA, PacBell must frequently haul local traffic[3] for Pac-West that would ordinarily be locally routed on its own system, instead by a long-distance or intraLATA route. PacBell incurs costs of an indeterminate amount in order to "long haul" this traffic to a Pac-West POI in a distant tandem center,[4] and therefore proposes that Pac-West compensate it for doing so if Pac-West does not establish a POI at every PacBell tandem building or facility hub. Pac-West refers to the tandem switching and transport rates PacBell proposes to charge Pac-West for originating local calls handed off to Pac-West at a POI outside the originating caller's rate center or tandem sector within a LATA, as "Call Origination Charges"; PacBell prefers to call these, "long-haul charges".

Pac-West rejects PacBell's assertion that it is obligated to pay these additional charges, which Pac-West initially estimated to be as much as $40 million. Pac-West points out that its obligation under the Telecommunications Act is only to establish one POI per LATA, and that the alternative to paying these charges – i.e., providing a POI at every PacBell tandem or facility hub –

[3] Local traffic is traffic where both the calling and called parties are in the same rate center.

[4] A tandem center is defined by the tandem and the end offices which are associated with (subtend) that tandem. End offices are generally located in a rate center, so a PacBell tandem serves a number of rate centers.

would cost $12 million per year. Thus, argues Pac-West, it is confronted with a "Hobson's choice" between the two alternatives, either of which it regards as prohibitively expensive and unjustified under the Act.

When it enacted the Telecommunications Act, Congress intended to open local markets to competition, but did not intend to do so by forcing every CLEC to replicate the network of the ILEC whose facilities it must use. This would be expensive and inefficient, imposing unjustified costs on CLECs, given the availability of the existing ILEC network. On the other hand, the inevitable result of introducing competition is diversion of traffic, either existing or potential, that otherwise would have been carried by the ILEC. Under the facts presented here, it does not appear appropriate for Pac-West to derive all of the benefit from the disputed traffic without compensating PacBell for the cost of carrying it to Pac-West's POI. The tradeoff for not doing so would be additional investment in Pac-West's own network.

This is still an unsettled area of the Act. The question will apparently be settled in a decision to be issued by the FCC in a pending rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-032 (Rel. April 27, 2001), (the *Intercarrier Compensation NPRM*). In the interim, we recently reviewed the applicable principles in Decision (D.) 02-06-076 in Application (A.) 01-11-045 and A.01-12-026 (collectively, the GNAPs application.) Without reiterating the entire rationale, under circumstances similar to those presented here we decided that GNAPs, the CLEC, may not be assessed transport charges on the ILEC's side of the POI for local calls (as determined solely by the rating points), but that the originating carrier – in this instance the CLEC – must pay access charges in the form of transport and tandem switching, if applicable, to the terminating carrier (the ILEC) for carrying intraLATA traffic across the ILEC's network to the called

party. Finally, D.02-06-076 holds that for calls that are intraLATA in nature, i.e., those beyond 16 miles, traditional access charges will apply.

In this instance, the Arbitrator agrees with PacBell that Pac-West bears some financial responsibility for the cost of a call originated by PacBell to the extent that PacBell is not compensated by the originating caller. This prevents Pac-West from situating its POI anywhere in a PacBell LATA and compelling PacBell to pay the transport for calls regardless of the distances involved. Testimony at the hearing demonstrated that intraLATA distances can be substantial, 50 miles or more in some instances, and even though there is little basis in the record for determining what the associated costs are, those costs cannot be altogether disregarded.

As Pac-West observes, Pac-West negotiated with PacBell to specify the locations of its POIs in the earlier ICAs. Presumably, the current network interconnections reflect a deliberate compromise between the differing interests of the two companies, and do not include any POIs that grossly inflate PacBell's average tandem and transport costs for traffic handed to Pac-West. PacBell offers a compromise of the parties' present dispute by requiring Pac-West to compensate it only for those calls that generate extraordinary tandem and transport costs. Specifically, PacBell proposes to transport locally rated calls across rate centers without charging for the extra transport, so long as the Pac-West POI is at the tandem office serving the PacBell customer, and reduce the transport mileage by 16 miles. Although this proposal does not comport with the proscription against a CLEC being assessed transport charges on the ILEC's side of the POI for local calls as determined solely by the rating points, in concept PacBell appears to be on the right track with respect to other calls.

In the DAR the Arbitrator found that for this ICA the parties must adopt a provision that is consistent with the principles that the Commission applied in

D.02-06-076, the GNAPs case: PacBell may not assess tandem switching or transport charges on its side of the POI for local calls, but Pac-West must pay access charges in the form of transport and tandem switching, if applicable, to PacBell for carrying intraLATA traffic across PacBell's network to the called party. For calls that are more than 16 miles, traditional access charges will apply.

In its comments on the DAR, PacBell requests the Arbitrator to clarify that the use of rating points to implement these principles is in no way meant to address the issue of virtual NXX (VNXX) traffic, as discussed elsewhere. Pac-West's comments ask the Arbitrator to preserve the substantive outcome reached in the DAR on this issue, but clarify that (1) the long-haul charges do not apply to any local calls originated and delivered by PacBell to an existing POI of Pac-West for termination by Pac-West to a Pac-West customer; and (2) that the charges to PacBell for carrying intraLATA traffic across PacBell's network to the called party are to be TELRIC charges, rather than switched access tariffs that apply to toll traffic, and apply to Pac-West-originated traffic which terminates outside the local calling area where Pac-West's POI is located. The Arbitrator adopts the requested clarifications, except the request to adopt TELRIC charges, rather than switched access tariffs. It is the Arbitrator's intention to preserve the consistency of this finding with the GNAPs case.

Until the FCC settles this matter in the *Intercarrier Compensation NPRM*, these standards must apply under the current ICA, subject to provisions for handling intervening changes in the law.

Issue No. 7: Should the Parties Incorporate Performance Measures and Incentives Resulting From an FCC Decision in CC Docket Nos. 01-318 and 01-321 That Is Investigating National Performance Measures?

Discussion and Resolution:

In late 2001 the FCC initiated proceedings to review and potentially develop a set of national performance measures that would apply to ILECs and CLECs for UNEs, interconnection and special access services. Pac-West has added language to the ICA that would incorporate any such federally mandated national performance measures by reference, upon their effective date. Pac-West mirrored PacBell's "incorporation by reference" language related to this Commission's decisions, as agreed to in Section 1.5 of the Appendix Performance Measurements of the proposed ICA. Section 1.5 incorporates by reference any of this Commission's decisions related to performance measurements, performance incentives and any future modifications. Pac-West argues that the federally mandated performance measurements should be incorporated by reference in the ICA so that it will immediately benefit from them when they become effective. PacBell argues that immediate incorporation of these standards would be premature, and that the parties should negotiate any needed changes to the ICA at the time the new standards become effective.

The Arbitrator agrees with PacBell on this issue. Other provisions of the ICA address this situation effectively, and Pac-West has not offered any reason why a special exception should be made in this instance.

Issue No. 8: Should PacBell Be Required to Make Services Available to Pac-West and Its Affiliates at Wholesale Rates for Pac-West and Its Affiliates' Own Use?

Discussion and Resolution:

Pac-West contends that PacBell should be required to provide wholesale services to Pac-West at a resale rate so that Pac-West or its affiliates can make use of such services for the provision of telecommunications services to its customers. Pac-West argues that PacBell uses the same services in its provision of local exchange service and pays itself nothing. PacBell rejects this argument, and argues that the Telecommunications Act only obligates PacBell to sell services to Pac-West at wholesale rates when they are resold to end users; if Pac-West or an affiliate purchases a service for its own use, PacBell asserts it is not obligated to provide the service at wholesale rates.

PacBell cites D.97-08-059, *Re Competition for Local Exchange Service*, 74 Cal. PUC 2d 396, 422 (August 1, 1997), in support of its argument. That decision clearly supports PacBell's argument. Pac-West does not point to any contrary authority to support its position. The Arbitrator therefore decides this issue in favor of PacBell.

Issue No. 9: Should Pac-West Agree to Relinquish Control of an Unbundled Element Concurrent With the Disconnection of Its End User?

Discussion and Resolution:

PacBell contends that Pac-West is obligated to return control (or possession) of a UNE to PacBell upon disconnection of service by the associated end user. Pac-West wants to retain control of the UNE until it is clear that the former customer seeks to take service from another carrier, or until a new end user moves in and requests service from another carrier. Applicable FCC

regulations do not specifically address the time period for which Pac-West is entitled to retain control of the UNE under these circumstances.

The UNE belongs to PacBell, and should be returned to its inventory upon disconnection of the end user. However, recognizing that a CLEC experiences time delays acquiring access to a UNE, this obligation should not arise instantaneously. As Pac-West notes, such time delays hamper effective competition by the CLEC. Pac-West should have a reasonable opportunity to utilize the UNE before it must relinquish control to PacBell. The Arbitrator believes a period of 24 hours is reasonable and will prevent hardship to customers, and the ICA should so provide in the absence of the parties' selection of a negotiated alternative.

Issue No. 10: Should PacBell Provide Pac-West With Enhanced Extended Loops (EELs)?

Discussion and Resolution:

An EEL is a combination of two unbundled network elements – the local loop and dedicated transport. The EEL allows a facilities-based CLEC to extend its network to its customer using unbundled loops without collocating in every PacBell central office. Currently, federal law and Commission decisions require PacBell to convert existing special access circuits to EELs when Pac-West certifies that it provides the end user with a "significant amount of local telephone exchange service" as defined by three tests defined by the FCC. *In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (1999) at ¶ 22. This Commission has also ruled that PacBell is required to create combinations of elements not currently combined in its network, *see* D.99-01-050; D.00-08-011 at p. 7, a principle that is currently the subject of judicial review.

During the pendency of this proceeding, the United States Supreme Court issued *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, which in part circumscribes the applicable FCC rule. The Arbitrator finds that Pac-West's proposal should be adopted for the ICA, but must be modified to reflect limitations contained in the *Verizon* case, *id.*, at 1683-87.

Issue No. 11: Should Pricing for Bona Fide Requests (BFRs) Be Subject to Negotiation?

Discussion and Resolution:

A "bona fide request" or "BFR" is a request from a CLEC for a network element or combination of network elements that is not expressly contemplated in the ICA, and that PacBell has not been ordered to make available. The ICA allows Pac-West to make such requests. Assuming that a BFR is technically feasible, PacBell determines the cost of the BFR based on the costs of its constituent elements, relying wherever possible on costing principles established by this Commission in the OANAD proceeding. PacBell contends that the resultant price of a BFR is developed as an empirical exercise only, and that because Pac-West agrees the OANAD price components are the proper basis for determining of the BFR price, such requests are non-negotiable. If there is a dispute about the component costs, PacBell believes that the proper way to resolve it is through the dispute resolution procedures of the ICA. Pac-West rejects PacBell's position, and asserts that it should have the right to "question how [PacBell] arrived at a price for the BFR and, if appropriate," negotiate the price.

Because the price components of a BFR are objectively ascertainable, negotiation of the price is not appropriate. What is actually at issue here is disclosure, and it is the Arbitrator's opinion that PacBell is obligated to disclose fully at the time it makes the quote how it arrived at the price for a BFR, so that

Pac-West may verify the component cost elements. If there is a dispute concerning those elements or the methodology used to compile the BFR price, the parties may resort to the dispute resolution procedures in the ICA. The parties should revise the proposed language of the ICA to this effect.

Issue No. 12: Are Calls to Internet Service Providers (ISPs) Considered Local Calls?

Issue No. 13: Should All ISP Calls, Including Those not Delivered to Pac-West in the Same Local Calling Area in Which They Originate, Be Rated and Paid Reciprocal Compensation at Local Rates?

Discussion and Resolution:

These two issues, although initially identified separately by the parties, are interrelated and appear to be appropriately resolved together. The basis for the dispute may simply be a misunderstanding between PacBell and Pac-West about the terminology in question.

The dispute is whether calls to ISPs should be considered local calls and, if so, whether they require terminating compensation under the ICA. Pac-West's language as proposed for the ICA includes ISP calls that are locally dialed, which is consistent with the Commission's definition of local calls and PacBell's approach to reciprocal compensation in the ICA.

Under the Commission's decisions, calls are defined as either "local" or "toll" based on the NPA-NXX assigned to the calling and called customers. When the NPA-NXXs of the calling and called customers are assigned to the same local calling area, the call is local, and when the NPA-NXX of the called customer is not assigned to the same local calling area as the caller, the call is a toll call. Pac-West emphasizes that it is the assignment of NPA-NXX codes that defines whether a call is local or toll, not whether the call is to an ISP. Pac-West

states that it would not object to including language in the ICA to clarify its position, and suggests revised contract language in its brief to accomplish this.

PacBell appears to agree that the rating of the call is what governs whether the call receives reciprocal compensation at local rates, and that ISP-bound calls rated as local will, for purposes of the ICA, be treated as local calls. Conversely, the parties appear to agree that, if the called and calling NPA-NXXs are not assigned to the same calling area, calls between those NPA-NXXs should be classified as toll calls. The controversy seems to relate solely to virtual FX calls, a subject that is addressed in the following section.

Pac-West's proposed language related to "assignment" of NPA-NXXs is consistent with the Commission's determinations on the subject of defining local and toll calls, and PacBell does not appear to dispute the ICA's definition of local calls as presented by Pac-West, based upon such assignment. As it is framed, the dispute concerns whether ISP bound calls should be classified as "local" for purposes of reciprocal compensation. On this point, the parties also agree: ISP-bound traffic that is locally dialed is subject to reciprocal compensation. Consequently, for purposes of reciprocal compensation, the assignment of the calling and called parties' NPA-NXX is determinative, and Pac-West's revised language adequately expresses the parties' agreement. That language is set forth at Paragraph 12 of Attachment A to Pac-West's Comments, and is the language the Arbitrator adopts.

Issue No. 14: Should PacBell Be Allowed to Collect Transport Charges on Calls Destined to Pac-West Customers With Disparate Rating and Routing Points?

Discussion and Resolution:

This issue comes into play when a Pac-West customer resides in one local exchange, but has an NXX (central office) code that would not normally be rated as a local call when called from the exchange in which the customer is located. Thus, the call is actually routed to a different local exchange and is not terminated to a customer located within the exchange where the NXX is rated. This is referred to as "virtual FX" or "VNXX" traffic. Pac-West utilizes virtual FX service to attract ISP customers, because it enables them to offer locally-rated telephone access to their own customers who reside in exchanges where they would normally incur toll charges to gain Internet access.

The Commission recently addressed this situation in the GNAPs decision, D.02-06-076, and reviewed the underlying principles:

> We view this … in the nature of traditional tariffed FX service, where the customer obtains a local presence in a different community, but the customer pays to transport those calls from the central office which actually serves the customer to the central office where the customer wants to establish a calling presence. FX customers do not get the service at no charge, and we believe that the ILEC should be compensated for routing the traffic to a different rate center.
>
> * * *
>
> These VNXX calls would be intraLATA calls, not local calls, if tied to the rate center that serves the customer. By allowing disparate rating and routing, we are allowing for those calls to become local calls, and as such, subject to reciprocal compensation. However, (the CLEC) is required to pay the additional transport required to

> get those calls to where they will be considered local calls. *Id. mimeo.*, pp. 25-26.

Consistent with the outcome in GNAPS, the DAR found that PacBell should also receive transport charges from Pac-West for VNXX traffic pending FCC resolution of the issue in the *Intercarrier Compensation NPRM*. In their comments Pac-West and O[1] criticized this result under the present facts.[5] Based upon those comments, the Arbitrator is persuaded that the outcome should be changed here.

First, Pac-West distinguishes the circumstances here from those presented by GNAPs in that the parties cannot determine which calls terminated by Pac-West will terminate back to the originating local calling area, and thus clearly be "local", versus VNXX calls that would incur long haul charges. Second, as distinguished from GNAPs, the record demonstrates that Pac-West provides various types of local services through disparate rating and routing, and that these services are offered using the traditional local calling areas of PacBell for purposes of defining local and toll traffic, a situation quite different from GNAPs' proposal to establish LATA-wide "local" service. Third, PacBell's transport activity does not differ when sending a call to Pac-West, whether a call is returned on the Pac-West network to the originating local calling area (where the called number is rated) or terminated to another location by Pac-West. In either case PacBell's transport costs are the same. Pac-West points out that Pac-

[5] Although the Arbitrator takes notice of *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Communications Act and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc., et al.*, DA-02-1731 (released July 17, 2002) (Memorandum Opinion and Order), the Arbitrator does not consider that decision to be dispositive of the issue presented here, because, as an arbitral decision, it is not a binding decision of the FCC.

West's network configuration results in nearly all local calls delivered by PacBell to Pac-West being "disparately rated and routed", and the fact that some unidentifiable portion may be VNXX calls does not justify the imposition of long-haul charges on all calls.

O[1] 's comments echo the point that PacBell routes VNXX traffic to Pac-West in the same manner as any other, and does not incur any different costs delivering such calls to Pac-West. O[1] also points out that the analogy to PacBell's own FX service used in the DAR is inappropriate and counter-productive, because it is based upon PacBell's "legacy" network. Essentially, O[1] asserts that PacBell has the ability to modernize its network, and that it is not proper to force Pac-West to sleep in PacBell's Procrustean bed: "Simply because [PacBell] continues to maintain tiny rate centers served by remotely-located tandems and has chosen to assess FX or toll charges for calls between those rate centers, does not mean that it should also be entitled to recover transport costs for delivering virtual FX traffic to Pac-West. Such charges would [effectively require] competitors to duplicate [PacBell's] network design and [discourage Pac Bell] from making changes enabling it to handle traffic more efficiently." (Comments, p. 7.)

These comments highlight the factual differences between GNAPs and the present case. The Arbitrator finds these facts and principles persuasive, and adopts Pac-West's resolution of the issue, as reflected in its contract proposal. However, consistent with GNAPs, the parties should ensure that "[a]ny decisions [concerning this subject] issued by this Commission or the FCC will be covered by the change of the law provisions" of the ICA. *Id. at 30.*

Issue No. 16: When PacBell Delivers Traffic to Pac-West That Originates on the Network of a Third-Party Carrier and Which Does not Include

OCN, Should PacBell Be Required to Pay Reciprocal Compensation to Pac-West?

Discussion and Resolution:

This issue concerns transit traffic over PacBell's network. This is traffic that does not originate or terminate on PacBell's network, but originates on the network of a third-party carrier, is handed off by that carrier to PacBell, and then is carried on PacBell's network and handed off to Pac-West for termination on Pac-West's network. PacBell asserts that delivery of transit traffic to Pac-West does not directly benefit PacBell or its end users, but PacBell cannot refuse such traffic. When an originating third-party carrier delivers a call to PacBell for transit to Pac-West, the originating third-party carrier is obligated to pay reciprocal compensation to Pac-West. If the originating third-party carrier has not provided information sufficient for Pac-West to bill the originating third-party carrier, Pac-West looks to PacBell for reciprocal compensation, thus making PacBell the guarantor of the originating third-party carrier's obligation. PacBell naturally objects to doing so, as this obligation would be altogether avoided but for Pac-West's role as terminating carrier. The resultant conflict calls for a fair, commonsense solution, which the parties have been unable to fashion for themselves.

The specific information that is supposed to accompany the call for purposes of establishing the compensation obligation is the Originating Carrier Number (OCN). When Pac-West receives a call that does not include the OCN, it claims to have no means of identifying and billing the originating carrier. Pac-West contends that PacBell does have the means to identify the originating carrier, and therefore to provide the information necessary for Pac-West to bill that carrier. One way, according to Pac-West, is by reviewing the originating carrier's trunk group; another is by examining an internal PacBell report called

the "Category 50" report. However, both of these methods appear to be imperfect: the trunk group record provides only partial information, because it does not indicate the destination of the call; the "Category 50" report does not contain OCN information on all calls.

The DAR reflects the Arbitrator's belief that Pac-West is the real beneficiary of calls directed to its customers, and that PacBell does not benefit from such calls. Because it is not responsible for omission of the OCN, it follows that Pac-West should bear the ultimate risk that the originating carrier fails to include this information, and the Arbitrator so found. However, the DAR does not completely relieve PacBell of responsibility, and imposes upon Pac Bell the obligation to exert its best efforts from available sources to identify the originating carrier for each transit call that lacks OCN information. The DAR accordingly required the parties to reform the ICA in a manner reflecting these obligations, and specifying the sources and methods PacBell shall utilize to furnish this information to prevent disputes.

In its comments Pac-West challenges the accuracy of two assumptions upon which the Arbitrator relied in so ruling: first, that Pac-West is the real beneficiary of such terminating traffic; and second, that PacBell does not benefit therefrom. In actuality PacBell receives transit charges from the originating carrier on calls which include call set up and minute of use rate elements. Absent a ruling to the contrary Pac-West does not receive any compensation (i.e., reciprocal compensation) for such unidentified calls. These corrections nevertheless beg the question of who bears the primary risk if a call is terminated without OCN information. The Arbitrator believes that Pac-West can require PacBell to do no more than exert its best efforts to obtain that information, as set forth in the DAR, and the outcome remains unchanged.

Issue No. 17: Should the ICA Contain Language That Allows PacBell to Formalize Its Reservation of Rights on Untested Emerging Technologies Such as Voice Over Internet Protocol (VOIP)?

Discussion and Resolution:

PacBell seeks to include a provision to make it clear that the ICA does not contemplate that PacBell pay reciprocal compensation for Internet Telephony (IT) and/or VOIP, even though another provision of the ICA specifies the types of traffic to which reciprocal compensation does apply. The disputed provision also includes a reservation of rights in favor of both parties to raise the appropriate treatment of IT/VOIP under the dispute resolution provisions of the ICA. Pac-West argues that the provision in controversy is vague and overbroad, and will lead to disputes.

The disputed provision states:

> The Parties reserve the right to raise the appropriate treatment of Voice Over Internet Protocol (VOIP) or other Internet Telephony traffic under the Dispute Resolution provisions of this Interconnection Agreement. The parties further agree that this Appendix shall not be construed against either Party as a "meeting of the minds" that VOIP or Internet Telephony traffic is or is not local traffic subject to reciprocal compensation. By entering into the Appendix, both Parties reserve the right to advocate their respective positions before state and federal commissions whether in bilateral complaint dockets, arbitrations under Sec. 252 of the Act, commission established rulemaking dockets, or in any legal challenges stemming from such proceedings.

This provision is neither vague nor overbroad. Although it refers the parties to the Dispute Resolution provisions of the ICA in the event that they disagree on the treatment of IT/VOIP, it is difficult to see how it would generate disputes. This provision should remain in the ICA.

Issue No. 18: Does This ICA Contemplate the Treatment of CMRS and Paging Traffic?

Discussion and Resolution:

CMRS and paging carriers provide specialized wireless services by forwarding wireline calls to their customers. Consequently, CMRS and paging companies themselves terminate traffic, and are entitled to enter into reciprocal compensation agreements with carriers like PacBell.

PacBell turns this circumstance into an argument that even though a CMRS or paging company may order tariffed local service from Pac-West, PacBell should not be obligated to pay reciprocal compensation to Pac-West. PacBell appears to take the position that these wireless carriers must instead interconnect directly with PacBell to prevent arbitraging of the existing regulatory structure. However, it is in the interest of open competition to allow the CMRS or paging company to determine whether or not it is in its own interest to receive local service from an intermediary CLEC. Presumably, if there is no advantage in doing so, the CMRS or paging company will not order its service from the CLEC, and the marketplace will decide the fate of the service.

It is not appropriate to determine in this arbitration whether or not a CMRS or paging company should receive local service from a CLEC as a policy matter. The law currently permits it do so, and the ICA should not foreclose that possibility, nor deny Pac-West reciprocal compensation where appropriate.

Issue No. 20: How Should the Parties Compensate Each Other for IntraLATA Toll Traffic?

Discussion and Resolution:

Symmetrical application of rates applies to reciprocal compensation traffic for local calls, but has not been applied to the exchange of intraLATA toll traffic at switched access rates. PacBell seeks to use its tariffed rates when Pac-West

terminates intraLATA toll traffic to PacBell, but rejects the use of Pac-West's switched access tariff rates for intraLATA toll traffic that Pac-West terminates for PacBell. PacBell instead advocates that the parties depart from the existing practice of applying their respective tariffs to the termination of intraLATA toll traffic and adopt the symmetrical application of rates, using PacBell's tariffed exchange rates. PacBell argues that the FCC has deemed ILECs' costs to be "reasonable proxies for other carriers' costs of transport and termination," citing the FCC's *Local Compensation Order*, ¶ 1088, and that the use of its rates is therefore justified.

PacBell offers no support for this assertion with respect to the particular facts of this case, nor any indication that the competitive marketplace – and thus consumers – would benefit from instituting this change. Absent such a showing, there is no reason to direct the parties to vary from their existing practice.

Issue No. 21: Is Pac-West Entitled to Receive Tandem Switching and Transport Rates for Reciprocal Compensation?

Discussion and Resolution:

In order to receive tandem switching and transport rates Pac-West must satisfy a geographical area test by demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch." 47 C.F.R. § 51.711(a)(3). The Commission has not yet articulated a clear definition of the required showing, so this arbitration must establish its own test.

The Act appears to focus upon the LATA as the basic geographic unit for establishing service by a CLEC. A CLEC must establish an interconnection within a LATA in order to open the door to competition in that LATA. There are only three LATAs in which Pac-West's switches are actually located, and each switch receives traffic from and delivers traffic to exchanges in the LATA where

it is located. Each switch also serves exchanges located in adjacent LATAs where Pac-West does not have a switch, but does have a POI.[6] Comparison of the areas served by each party's switching equipment indicates that each Pac-West switch serves at least as great a geographic area, both in terms of square miles and the number of exchanges, as the Pacific tandems in the same LATAs. It is illogical to require that Pac-West actually serve customers in each exchange before it can satisfy the geographic area test if it stands ready to do so, because the very purpose of encouraging competition is to enable CLECs to win over a meaningful market share of customers in all areas where their service is available. Until the FCC or this Commission provides more definitive guidance, under the facts presented there is sufficient basis for finding that Pac-West satisfies the geographic area test.

Notwithstanding the geographical extent of Pac-West's service, a significant proportion of Pac-West's customers are concentrated (and collocated) at its switches. It is not appropriate for Pac-West to receive tandem rates for calls terminated to these collocated customers, because such compensation does not reflect the actual handling of this traffic. In its comments PacBell suggests a compromise option that more realistically reflects reality: Pac-West may receive the tandem switching rate for collocated customers, but not the tandem transport rate. Thus Pac-West would only receive tandem transport rates for traffic it terminates to non-collocated customers. Absent clear guidance from the FCC

[6] Pac-West also argues that its switches also serve each LATA by way of Pac-West's assignment of NPA-NXX codes in each exchange for its Type Six Service, which provides such customers with a local presence in all of Pacific's exchanges, thus "serving" these exchanges for these customers, and satisfying the FCC rule.

this is a fair resolution of the present controversy, and the ICA must be crafted accordingly.

Issue No. 23: Should Pac-West Be Able to Reserve Its Rights to Challenge the FCC's ISP Remand Order Regarding Growth Caps?

Discussion and Resolution:

Pac-West seeks to include a provision in the ICA to reserve its right to challenge the FCC's *ISP Remand Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, I16 FCC Rcd 9151 (2001).* The *ISP Remand Order* is currently under review by the D.C. Circuit, see *WorldCom, Inc. et al.* v. *FCC et al., 288 F 3d 429* (D.C. Cir. 2002), but remains in effect in the interim.

The language of the provision Pac-West seeks to insert is the following:

> The Parties disagree on whether Pacific is lawfully permitted to establish a growth cap on Internet-bound minutes. By entering into this Agreement, Pac-West reserves its right to advocate its position on this issue.

Why Pac-West seeks to insert this language in the ICA is perplexing to the Arbitrator. The first sentence implies that the parties agree that they disagree on the topic. The second and third sentences suggest that PacBell is seeking to prevent Pac-West from exercising its right to challenge the *ISP Remand Order*, which PacBell denies. Finally, there does not appear to be any reason why this specific issue cannot be encompassed in a more general reservation of rights provision. Although the proposed language seems innocuous, including it in the ICA could create confusion, and it should be stricken from the ICA altogether.

Issue No. 24: Should the "Legitimately Related Terms" Section Include a Reference to the Section

on Intervening Law in the General Terms and Conditions?

Discussion and Resolution:

The ICA contains an intervening law provision in the General Terms and Conditions. In addition, the portion of the ICA that specifically addresses reciprocal compensation (Appendix Reciprocal Compensation) includes a section (Section 14.1) that identifies which terms in the rest of the ICA are "legitimately related" to the terms in Appendix Reciprocal Compensation. PacBell explains that it is important to identify legitimately related terms in this section, because another carrier that desires to opt into the reciprocal compensation terms of the Pac-West ICA must also agree to all other "legitimately related" terms of that ICA. A specific reference to the General Terms and Conditions provision concerning intervening law consequently has the effect of incorporating that provision into the narrower reciprocal compensation section as though it were expressly set forth in that section. This would bind another carrier opting into the ICA to comply with the parties' agreement concerning the effect of changes in the law during the terms of the ICA.

Pac-West objects to including "intervening law" in the list of some 40 terms incorporated in Appendix Reciprocal Compensation by reference to the General Terms and Condition, because of the highly specific nature of the reciprocal compensation provisions. As Pac-West explains, it wants the terms deleted,

> because the intervening law clause of the General Terms and Conditions agreement (Section 30.18) is very general in nature and requires the [p]arties to negotiate an amendment to incorporate changes caused by intervening law [,] and if they are unsuccessful, resolve the dispute through the dispute resolution process set forth in the Agreement. That clause is appropriate, generally, for other terms and conditions of the Agreement, but is inappropriate as

> applied to the hard-fought terms and conditions in Appendix Reciprocal Compensation. How the Parties will handle intervening law for Reciprocal Compensation is dealt with specifically in that appendix. Sections 1.6, 3.2, 6.1.1, 6.2, 6.3, 6.4.2, 6.9.2, 13.4 and 13.5 of Appendix Reciprocal Compensation **all** address how the Parties will handle changes in the law as it applies to intercarrier compensation.

Thus, argues Pac-West, reference to the General Terms and Conditions will be confusing.

In its comments PacBell notes that the specific provisions in Appendix Reciprocal Compensation address only three specific potential intervening law events (specifically, three pending cases) of which the parties were aware when they were negotiating the ICA. This is not necessarily an exhaustive list of intervening law events (which may also include new legislation and regulations) that could affect reciprocal compensation between the parties during the term of the ICA. The agreement must be able to comprehend additional unforeseen events of this sort, and does not expressly do so in the form proposed by Pac-West.

The Arbitrator now agrees that any potential confusion to third parties that may be caused by reference to Appendix Reciprocal Compensation is outweighed by avoidance of future disputes if PacBell's more comprehensive approach is adopted. PacBell's contract solution is therefore adopted as the preferable one.

Conclusion

The final decision of the Arbitrator on each disputed issue is set forth above. Within seven days of the filing of this FAR the parties must file the entire conformed ICA and respective statements, as provided in Rule 4.2.1.

Dated November 19, 2002, at San Francisco, California.

/s/ VICTOR D. RYERSON
Victor D. Ryerson, Arbitrator
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Final Arbitrator's Report on all parties of record in this proceeding or their attorneys of record.

Dated November 19, 2002, at San Francisco, California.

/s/ KE HUANG
Ke Huang

N O T I C E

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* *

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